IN THE

Supreme Court of the United States

October Term, 1958.

No. 339

NEW HAMPSHIRE FIRE INSURANCE COMPANY,

Petitioner,

v.

THOMAS E. SCANLON, District Director of Internal Revenue, CITY OF NEW YORK and ACME CASSA, INC.,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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New Hampshire Fire Insurance Company prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit entered in this case on June 23, 1959.

OPINIONS BELOW

The opinion of the District Court is reported in 172 F. Supp. 392 and is contained in the appendix record printed for the Court of Appeals filed herewith pursuant to Rule 21, at page 14a. The opinion of the Circuit Court of Appeals is contained in the appendix filed herewith, at page 17a.

JURISDICTION

The judgment of the Circuit Court of Appeals is dated and was entered on June 22, 1959. (Appendix p. 19a) The jurisdiction of this Court is invoked under 28 U. S. C., § 1254(1).

QUESTION PRESENTED FOR REVIEW

Do the United States District Courts have jurisdiction under 62 Stat. 974, 28 U. S. C. § 2463 to determine, in a summary proceeding instituted by order to show cause and petition, the rights to property improperly detained under the alleged authority of the revenue laws?

STATUTE INVOLVED

The statute involved is 62 Stat. 974, 28 U. S. C. § 2463 which provides:

> "§ 2463. Property taken under revenue law not repleviable.
>
> All property taken or detained under any revenue law of the United States shall not be repleviable, but shall be deemed to be in the custody of the law and subject only to the orders and decrees of the courts of the United States having jurisdiction thereof."

STATEMENT OF THE CASE

The petition alleges that a construction contract was entered between Acme Cassa, Inc., a contractor, and the City of New York. A condition to the making of the contract was the furnishing of performance and payment bonds

by the contractor. The petitioner herein, New Hampshire Fire Insurance Company, a surety company, executed these bonds, as surety, on behalf of Acme Cassa, Inc., as principal, in favor of the City of New York, as obligee.

After commencement of performance of the contract, Acme Cassa, Inc. became financially unable to continue performance or to pay its subcontractors and suppliers of material and labor. Petitioner, as surety, financed completion of the contract and made payments to unpaid subcontractors, laborers and suppliers. As of November 25, 1958 these payments totalled $82,990.17.

Since January 7, 1958, the City of New York has had available for delivery to petitioner a warrant in the amount of $68,015.50. Another warrant for the final contract payment in the amount of $35,930.80 will be issued by the City of New York in the future. The available warrant has not been delivered to petitioner because of certain notices of liens and notices of levy served by Thomas E. Scanlon, District Director of Internal Revenue upon the City of New York. These notices of liens and levies arise out of unpaid taxes, totalling $39,004.67 as of January 21, 1959, claimed to be due from the contractor, Acme Cassa, Inc. Respondent Thomas E. Scanlon consented to the payment to the surety of $28,515.50 from the $68,015.50 warrant.

In its petition to the District Court the petitioner herein claimed (1) that it is clear that under the law of the State of New York, it is subrogated to the rights of the City of New York, its obligee, to the unpaid contract balance and that, as subrogee, it is entitled to the contract balance in question against any claims of the Government based on unpaid taxes of its principal; and (2) that 62 Stat. 974, 28 U. S. C. § 2463 places its property which has been improperly detained by the District Director of Internal Revenue in the custody of the law and that, upon its petition, the

District Court must render an appropriate order or decree relating to the disposition of the property.[1]

Upon the petition the District Court issued an order directing respondents Thomas E. Scanlon, the City of New York and Acme Cassa, Inc. to show cause why the above mentioned Notices of Levy should not be quashed (Appendix p. 2a). Only respondent Scanlon appeared in opposition to the petition.

The District Court, relying upon *In re Behrens*, 39 F. 2d 561 (2nd Cir. 1930) and *Goldman* v. *American Dealers Service*, 135 F. 2d 398 (2d Cir. 1943), dismissed the petition, holding that the District Court had no jurisdiction in a summary proceeding to adjudicate rights to the property even though the property was placed by statute in the custody of the law. In so holding the District Judge stated:

> "To the extent that *Raffaele* v. *Granger*, 3rd Cir. 1952, 196 F. 2d 620 and *Rothensies* v. *Ullman*, 3rd Cir., 1940, 110 F. 2d 590 held contrary, I decline to follow them."

The Court of Appeals for the Second Circuit affirmed in a per curiam opinion reading as follows:

> "Upon the opinion of Judge Cashin, D. C. S. D. N. Y., April 16, 1959 [172] F. Supp. [392], the order is affirmed."

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[1] The Courts below assumed that Scanlon's actions effected a "detention" of "property" within the meaning of 28 U. S. C. § 2463. This is consistent with the decision of the Court of Appeals for the Ninth Circuit in *Seattle Association of Credit Men* v. *United States*, 240 F. 2d 906 (1957). *Accord, Raffaele* v. *Granger*, 196 F. 2d 640 (3rd Cir. 1952); *United States* v. *Eiland*, 223 F. 2d 118 (4th Cir. 1955).

REASONS FOR GRANTING THE WRIT

1. There is a direct conflict between the decision below and decisions of the Court of Appeals for the Third Circuit.

The decision of the Court of Appeals conflicts directly with the decisions of the Third Circuit Court of Appeals in *Raffaele* v. *Granger*, *supra*, and *Rothensies* v. *Ullman*, *supra*. This conflict was expressly recognized by the District Judge in his opinion in the quotation reproduced above. As stated, the Court of Appeals affirmed "upon the opinion" of the District Court.

In both of the Third Circuit cases warrants of distraint improperly issued by federal tax officials were quashed in summary proceedings upon petition by the owner of the affected property. In both cases the Court of Appeals for the Third Circuit affirmed the district courts and, in *Raffaele*, stated that "* * * a plenary civil suit is not necessary to enable a court to exercise jurisdiction over property thus *in custodia legis*." *Raffaele* v. *Granger*, 196 F. 2d 620, 623 (3rd Cir. 1952). This statement and the holdings of the Court of Appeals for the Third Circuit clearly conflict with the decisions of the courts below in the instant case.[2]

[2]In addition conflict apparently exists among the district judges in the Southern District of New York in the construction of this Statute. In a similar case decided one week after the instant case (*Fine Fashions Inc.* v. *Moe*, 172 F. Supp. 547 (S. D. N. Y. 1959)) Bryan, *D. J.* stated at p. 551: "It may well be that it is within the discretion of the court to grant final relief on a summary petition when the seizure is totally without warrant of law." This statement contrasts directly with the statement by the District Court in the instant case that "* * * the District Court has no jurisdiction to determine the respective rights [to the property] * * * in a summary proceeding." 172 F. Supp. 392, 393. This last statement, apparently adopted by the Circuit Court in the instant case, also appears inconsistent with the statement by Dawson, *D. J.*, in *Winokur* v. *A'Hearn*, 172 F. Supp. 498, (S. D. N. Y. 1956), that summary proceedings might be proper in similar cases where no contested issues of fact exist.

2. A substantial and novel question of interpretation of a federal statute is involved.

In addition to this recognized conflict, there is a conflict between the Circuit Courts of Appeals for the Third and Fifth Circuits concerning the basis for affording a remedy to parties affected by improper seizures under the revenue laws. The Fifth Circuit Court of Appeals in *Holland v. Nix*, 214 Fed. 2d 317 (1954) has indicated that "equitable principles" would sustain a suit in a federal court to prevent an improper seizure of property by federal tax officials. In *Raffacle* and *Rothensies* the Third Circuit Court of Appeals held that § 2463 affords the basis for such a suit and that summary proceedings may be maintained to obtain the relief sought. The Second Circuit Court of Appeals held, in the instant case, that summary proceedings are not maintainable but has not yet decided whether such a suit must be based upon § 2463 or upon "equitable principles".

A decision by this Court in the instant case would not only resolve the conflict between the Second and Third Circuit Courts of Appeals whether summary proceedings may be maintained but would also resolve the question of whether § 2463 provides the basis for quashing federal tax levies against the property of a non-taxpayer. Thus uniformity in the interpretation of this federal statute would be implemented.

This question is plainly of substantial import. A party whose property has been improperly seized by a District Director to satisfy the tax liability of another should be able to obtain a determination of his claim quickly in a federal court. It would appear that Congress so intended since the property improperly detained was placed *in custodia legis*. The opinion of the Court below would put affected parties to the time consuming and expensive processes of a plenary suit at law, while similarly situated parties in other circuits are afforded a more expeditious method of

having their claims adjudicated. The tax laws affect nearly everyone in their application. Seizures of property to satisfy unpaid taxes are numerous. Seizures of the property of non-taxpayers to satisfy the tax liability of others are not rare and have been involved in several reported cases.

The only cases found in this area decided by this Court are *Ex Parte Fassett*, 142 U. S. 479 (1892) and *GoBart Co. v. United States*, 282 U. S. 344 (1933).

In *Fassett*, the question presented was whether a writ of prohibition should issue to a District Court to prevent the lower Court from further proceeding with a libel proceeding brought by the owner of a yacht against a federal tax official who allegedly had improperly seized the vessel for violation of the customs laws. The vessel concerned had been attached by a federal marshal under court order. This Court refused to issue the writ on the ground that the predecessor of § 2463 (containing the same provisions as the current § 2463) granted jurisdiction over the matter to the District Court and because the District Court had acquired jurisdiction over the vessel by the attachment.

In *GoBart*, certain documents had been seized by prohibition agents. The defendants in a criminal prosecution under the Prohibition Act moved for an order directing the United States to return these items and preventing their use as evidence in a criminal proceeding. The Circuit Court of Appeals for the Second Circuit considered the problem of the jurisdiction of the District Court to entertain a summary proceeding of the type there involved, and decided that since the prohibition agents were not officers

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See, e.g., Seattle Association of Credit Men v. U. S., 240 F. 2d 906 (9th Cir. 1957); Ursa, Inc. v. Dudley, 231 F. 2d 178 (3rd Cir. 1956); Lavino v. Jamison 230 F. 2d 909 (8th Cir. 1956); Holland v. Nix, *supra*; Raffaele v. Granger, *supra*; Stuart v. Chinese Chamber of Commerce, 168 F. 2d 709 (9th Cir. 1948); Rothensies v. Ullman, *supra*; Fine Fashion, Inc. v. Moe, *supra*; Winslow v. Whyte, *supra*; Brinker Supply Co. v. Dougherty, 134 F. Supp. 884 (D. C. Pa. 1955); Long v. Rasmussen, 281 Fed. 236 (D. C. Mont. 1922).

of the Court nor acting under Court process, summary proceedings against them would not lie. The Court noted that, 62 Stat. 974, 28 U. S. C. § 747, 1940 ed., (now 28 U. S. C. § 2463) prohibited replevin proceedings to obtain the relief sought, and stated that a bill in equity, rather than a summary proceeding, was the proper method of obtaining the return of the documents. This Court reversed the Circuit Court on the ground that under the applicable statutes the prohibition agents were, in effect, officers of the Court and thus subject to the disciplinary powers of the Court. Therefore, the District Court had jurisdiction summarily to order them to return property illegally seized by them.

Neither of the above cases presented the problem of interpreting § 2463 to allow summary proceedings to recover property improperly seized by one not an officer of the Court. The instant case is the first to present squarely this problem to this Court in the more common situation involving seizures of property by tax officials.

3. The decision of the Court below appears erroneous and the conflicting decisions of the Court of Appeals for the Third Circuit, correct.

Petitioner respectfully submits that the decisions of the Court of Appeals for the Third Circuit in the *Raffaele* and *Rothensies* cases, *supra*, are correct and that of the Court of Appeals for the Second Circuit in the instant case is erroneous. The meaning of the first portion of this one sentence statute is clear; replevin is forbidden as a remedy and the State Courts are deprived of jurisdiction in this area. The second portion of the sentence places the property "in the custody of the law and subject to the orders and decrees of the courts of the United States having jurisdiction thereof." By reference to 62 Stat. 932, 28 U. S. C. § 1340 which gives the District Courts jurisdiction over civil actions arising under any federal revenue laws, juris-

diction is vested in the District Court for the District where the property is located. [*Pennsylvania Turnpike Commission* v. *McGinnes, et al.*, Civil Action No. 12,796, 3rd Cir., June 8, 1959, *petition for cert. filed*, July 17, 1959 (October Term, 1958, No. 223).] *Raffaele* v. *Granger, supra.*

It seems evident that a Court having custody of specific property which is expressly made subject to its orders and decrees has the power and obligation to determine the disposition of the property. It is respectfully submitted that such a Court cannot decline jurisdiction even if it subsequently should decide, in the exercise of its discretion, that in the circumstances of a particular case the necessity for summary proceedings was not shown and, therefore, ordered the case to proceed pursuant to the Federal Rules of Civil Procedure.

The interpretation petitioner advances is consistent with the legislative history of the section. The statute was designed to overcome certain difficulties in tax collection by federal tax authorities which were caused by an "Ordinance of Nullification" passed by South Carolina in 1832. This ordinance subjected federal officers to fine and imprisonment for seizing property for non-payment of federal taxes and, according to Senator Wilkins of Pennsylvania "overthrew the whole [federal] revenue system." Gale & Seaton's Register of Debates in Congress, Vol. IX, Part I, p. 248. Senator Wilkins then went on to state that:

> "This section has two objects in view: first, it gives power to officers to sue in the federal courts; and second, it provides that they shall not be dispossessed of property seized by them under the laws of the Central Government, without the authority of the courts of the United States." [Gale & Seaton, p. 259]

The seized property was therefore placed in the custody of the Federal Courts so that the question of the propriety of the seizure could be promptly determined. To require a

plenary suit by a non-taxpayer to repossess his property illegally seized under the alleged authority of a revenue law might expose the innocent non-taxpayer to the frequently extensive delays encountered in a civil suit which proceeds pursuant to the Federal Rules of Civil Procedure.

It is therefore respectfully submitted that in order to give its plainly intended meaning to the second portion of § 2463 the decisions of the Third Circuit Court of Appeals in *Raffaele* and *Rothensies* holding that the propriety of the seizure may be decided in a summary proceeding should be held correct and that of the Second Circuit Court of Appeals in the instant case incorrect.

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

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Counsel for petitioner

August 24, 1959